# Federal Court Dismisses FCA Claims Based on Alleged Customs Violations

In *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, a federal court in the Eastern District of Pennsylvania recently dismissed claims alleging that the defendant mismarked foreign-made pipe fittings in violation of the False Claims Act ("FCA"). Although the court's dismissal rested on the relator's conclusory factual allegations, the court addressed at length two other issues with implications for future FCA litigation: first, whether dissemination via certain online resources constitutes "public disclosure" for purposes of the FCA; and, second, whether customs marking duties qualify as an "obligation" under the FCA in light of the statute's amendment in 2009. A copy of the court's decision can be found here.

The *Victaulic* case is one of an increasing number of FCA lawsuits based on alleged violations of customs obligations. Relators in these cases have typically alleged that an importer declared false or misleading information about goods manufactured overseas to U.S. Customs and Border Protection ("Customs") in order to reduce or avoid otherwise applicable customs duties. For example, an importer might misrepresent a product's country of origin on customs entry forms to avoid paying antidumping duties applicable to goods from certain countries.[1]

## The Relator's Allegations

Relator Customs Fraud Investigations, LLC ("CFI") is a company that conducts research and analysis related to potential customs fraud. CFI alleged that the defendant, Victaulic Company, imported a large number of iron and steel pipe fittings manufactured in China, Poland, and Mexico that were marked "Made in the U.S.A." or bore no country-of-origin markings at all. Under the Tariff Act of 1930, products that are not properly marked to indicate their country of origin are assessed a ten percent ad valorem "marking duty," which Victaulic did not pay. CFI alleged that the mismarked products gave rise to a "reverse false claim" under the FCA – i.e., a fraudulent effort to avoid or reduce payments owed to the government.

## The Public Disclosure Bar

Victaulic argued that both steps of CFI's investigation involved information that was "publicly disclosed," thereby precluding CFI's claims under the FCA's public disclosure bar. First, CFI had consulted the Zepol database to determine the total volume of pipe fittings that Victaulic imported during the relevant time period. Zepol is an online compendium that collects and organizes information from shipping manifests and provides paid subscribers access to a searchable database. The court noted that the same underlying data available from Zepol is also collected by Customs and made available to the press and the public, albeit not in a conveniently searchable format. The court concluded that the information had nonetheless been disclosed in "news media," "administrative reports" or "federal reports" for purposes of the FCA.

The court declined, however, to dismiss on this ground because it held that CFI's claims largely depended on information from the second step of its investigation, which had not been publicly disclosed. CFI tracked secondary sale advertisements for pipe fittings manufactured by Victaulic on the auction web site eBay. According to CFI, a high percentage of the listings that were accompanied by photographs showed pipe fittings that had no country-of-origin markings or were marked "Made in the U.S.A." The court held that

[1] *See, e.g., United States ex rel. Dickson v. Toyo Ink Manufacturing Co.*, 3:09-cv-00438 (W.D.N.C.); *United States ex rel. Valenti v. Tai Shan Golden Gain Aluminum, Ltd.*, 3:11-cv-00368 (M.D. Fl.).

eBay listings do not fit within any of the enumerated categories of "public disclosure" listed in the FCA (e.g, "news media"), and that CFI's claims were therefore not subject to the FCA's public disclosure bar.

## Marking Duties as an "Obligation" Under the FCA

Prior to 2009, the FCA did not define the term "obligation," even though "an obligation to pay or transmit money or property to the Government" was an essential element of a reverse false claim. Several courts have defined "obligation" narrowly, excluding FCA claims where the asserted damages derived not from pre-existing customs obligations, such as antidumping duties, but from certain types of penalties. Most notably, the Sixth Circuit held in *United States ex rel. American Textile Mfrs. Inst., Inc. (ATMI) v. The Limited, Inc.* that a defendant's attempt to avoid paying marking duties did not meet the "obligation" requirement because marking duties were a "contingent" obligation, arising only after a finding of wrongdoing by government officials. In 2009, Congress amended the FCA and broadly defined "obligation" to include "established dut[ies], whether or not fixed."

Victaulic contended that *ATMI* and similar cases required dismissal of CFI's claims. CFI argued in response that legislative history for the 2009 amendment showed it was intended by Congress to overrule *ATMI*'s holding. Noting that this was a novel question, the court emphasized that it was not bound by either the legislative history or the pre-2009 case law, but rather by the actual language of the amended statute – which, the court acknowledged, was not very clear. However, because the court concluded that CFI's complaint was "virtually devoid of nonconclusory factual allegations," it dismissed the claims without deciding this issue, leaving the question unresolved by any court for the time being. We will continue to monitor developments in this evolving area of FCA jurisprudence.

If you have further questions about the implications of this decision, please consult your usual Ropes & Gray advisor or an attorney in our False Claims Act practice.

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